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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 710.

WILLIAM BUTLER, WILLIAM RUCKER,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF FOR THE STATE OF OHIO

In Opposition to the Granting of the Petition for a Writ of Certiorari to the Supreme Court of Ohio.

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Neither the Court of Appeals of the Eighth District nor the Supreme Court of Ohio wrote an opinion. The order of the Supreme Court of Ohio denying the appeal and overruling the Motion for a Writ of Certiorari is reported at 167 O. S. 17. The judgment of the Supreme Court of Ohio was entered on October 9, 1957. The Petition for Writ of Certiorari was filed on the 7th day of January, 1958. The jurisdiction of this Court is invoked by the Petitioners under 28 U. S. C. 1257 (2) and (3).

QUESTIONS PRESENTED.

1. Whether rights of Petitioners under the Fifth Amendment to the United States Constitution were violated

(a) Because they were charged with two offenses under different sections of the Ohio Revised Code, for substantially the same act.

(b) Because the trial court failed to instruct the jury to disregard testimony concerning actions of a

third person who was jointly indicted with Petitioners but was discharged by the Court at the close of the State's case.

2. Whether Petitioners' rights under the Sixth Amendment to the United States Constitution were violated when the court permitted testimony concerning the actions of a third person present at the scene of the alleged offense.

3. Whether the rights of Petitioners under the Fourth Amendment to the Constitution of the United States were violated when agents of the United States Treasury Department seized and searched the automobile of Petitioner Rucker at the scene of the alleged offense.

STATUTES INVOLVED.

The Sections of the Ohio Revised Code which are involved in this appeal are as follows:

> Section 3719.09 "No person * * * shall have in his possession or under his control any narcotic drug unless such drug is exempted under the provisions of Section 3719.15 of the Revised Code * * *"
>
> Section 3719.20(A) "No person shall (A) Possess for sale a narcotic drug except in accordance with the provisions of Sections 3719.01 to 3719.22, of the Revised Code * * *"

(Only the pertinent portions of the Statutes, under which the indictments are based are here quoted and set forth.)

STATEMENT.

The Petitioners were arrested in Cleveland, Ohio on August 17, 1956 and charged with violations of the Ohio Narcotics Law. They were subsequently indicted (1) for unlawfully having heroin in their possession and under their control contrary to the provisions of Ohio Revised

Code, Section 3719.09, (2) for unlawfully possessing heroin for sale contrary to the provisions of Ohio Revised Code, Section 3719.20 and (3) for unlawfully permitting the use of a vehicle for the illegal keeping of heroin contrary to the provisions of Ohio Revised Code, Section 3719.101.

The Petitioners Rucker and Butler were indicted jointly with one Macy R. Bullock who was discharged at the conclusion of the state's case. Trial was held before the Honorable Felix Matia in November 1956 and the jury returned a verdict of guilty on all three counts against the Petitioner Rucker and a verdict of guilty to the counts charging violation of Ohio Revised Code, Sections 3719.09 and 3719.101 against the Petitioner Butler. Both Petitioners were sentenced on all counts concurrently. On May 3, 1957 the Court of Appeals of Cuyahoga County, Ohio sustained the judgment of the Common Pleas Court. On October 9, 1957 the Supreme Court of Ohio overruled the Motion of these Petitioners for a Writ of Certiorari and denied their appeal.

The evidence adduced at the trial of this matter was briefly, as follows: After Petitioner Rucker and his female companion Macy R. Bullock visited a certain gasoline station and used the respective rest rooms there were found in the rest rooms, both the men's and the women's, practically identical packages containing what later proved to be heroin, a derivative of opium. Shortly after the envelopes of heroin were found and removed from the rest rooms, Petitioner Butler visited the station and the men's rest room and left immediately. The envelopes of heroin were then returned by the Federal agents who had been called to their respective places in the rest rooms. Petitioners Rucker and Butler returned together in Rucker's automobile a short time later and Petitioner Rucker went

into the men's rest room and came out carrying one of the packages of heroin and handed it to Petitioner Butler in the automobile. These two Petitioners were then apprehended by the Federal agents at which time the package of heroin was found on the floor of the automobile under Petitioner Butler's feet. Testimony as to the foregoing facts was adduced through the two gasoline station proprietors and the Federal narcotics agents as witnesses. All testimony concerning Defendant Macy Bullock was as to her actions in the presence of Petitioner Rucker.

ARGUMENT.

The facts disclose that these two petitioners were apprehended in possession of the narcotics and that they were arrested immediately after Rucker passed the package of narcotics to Butler. There was eye-witness testimony to this effect. What is circumstantial about such evidence? What inferences need be drawn except those from proven facts?

No testimony as to what Kenneth Schultz said was introduced or admitted over objection of defendants' counsel. Certainly, there was testimony concerning the actions of Kenneth Schultz in finding the narcotics in the ladies' rest room and his bringing the package into the service station office. The State's case against these defendants might have been even stronger if Kenneth Schultz could have been found to testify at the time of trial, but his testimony would have been only cumulative, as there were others who could and did testify as to the events leading to the arrest of the defendants.

In response to petitioners' argument concerning the admission of evidence on the activities of Macy Bullock, the third defendant jointly indicted, it is submitted that the said Macy Bullock was on trial with these defendants at

the time of the admission of such testimony and the testimony was properly admitted at that time and it was already before the jury when Macy Bullock was discharged at the conclusion of the state's case. The court's failure to instruct the jury to disregard such testimony could hardly be construed to be prejudicial, since all of the testimony concerning Macy Bullock was as to her actions in the presence of Petitioner Rucker.

As to the Petitioners' complaint concerning "search" of Petitioner Rucker's automobile, a study of the testimony will readily show that no "search," as such, was necessary. Upon opening the door of the car on the passenger side to apprehend Butler, who was sitting in the car and to whom Rucker had just passed the envelope of narcotics in question, the federal narcotics agents simply had to look at the floor of the car where Butler's feet rested to see the envelope. Such a procedure can hardly be referred to as a "search."

On the question of "double jeopardy," a perusal of Chapter 3719 of the Ohio Revised Code reveals an intent on the part of the legislature to segregate the prohibitions on "possession" of narcotics and on use of motor vehicles and buildings for dispensing, from the sections containing other prohibitions and regulations. It would appear that the legislature intended to prohibit possession of narcotics as a matter of public policy, and then, in Section 3719.20, made specific prohibitions with reference to the protection of individual persons from being exposed to narcotics by peddlers.

Viewing Chapter 3719 of the Ohio Revised Code as a whole one can hardly escape the conclusion that the legislature was describing two different classes of crimes when it purposely differentiated between "possession" and "possession for sale." Had that not been the intent, it would

surely have included mere possession as one of the subdivisions in Section 3719.20 and would have omitted Section 3719.09.

The pertinent portion of Ohio Revised Code, Section 3719.09, is as follows:

> "No person except * * * shall have in his possession or under his control any narcotic drug unless such drug is exempted * * * Possession by a person not excepted * * * is presumptive evidence of intent to violate the provisions of this section."

In Section 3719.99, wherein the penalties are set forth, a penalty for violation of Section 3719.09 is provided in paragraph C, to be a fine of not more than ten thousand dollars and imprisonment not less than two or more than fifteen years for the first offense.

The pertinent portion of Section 3719.20 is paragraph (a), which reads as follows:

> "No person shall:
>
> (A) Possess for sale a narcotic drug except in accordance with the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code."

The penalty provided for violation of this latter section is also contained in Section 3719.99, but in a different paragraph than the penalty provided for violation of Section 3719.09 and is imprisonment for a period of not less than ten nor more than twenty years for the first offense.

Again, by these separate provisions and penalties, the legislature indicated its intent to treat the two offenses in a different manner.

It is the contention of the State of Ohio that we are dealing with two different classes of crimes which are essentially different in their nature and which are considered crimes for different reasons.

In the case of *State vs. Labus,* 102 O. S. 26, 130 N. E. 161, the Court stated in its opinion, the following:

> "The doctrine of inferior degrees has never been applied by our courts to crimes which are inherently and essentially so different in their nature, character and atrocity as to belong to an entirely different class of crimes."

In that case, the Court held that the crime of incest was not included within the crime of rape as being one of an inferior degree to rape and based its reasoning upon the theory that rape was considered an offense against a person, whereas, incest could well be considered a crime against public policy.

Again, in the case of *Watha vs. State,* 14 O. C. C. n.s. 145, the Court held that one crime could not be considered as of an inferior degree or included in another where they belonged to different and individual classes of crime. There the Court held that one indicted as member of a lynch mob could not be found guilty of inciting to riot, inasmuch as inciting to riot was not an included offense.

This Court's attention is directed to *Barber v. State,* 39 O. S. 660, where the defendant was indicted for maliciously cutting with *intent to kill.* That indictment was then based on Section 6820, Revised Statutes, which provided that "whoever maliciously shoots, stabs, cuts or shoots at, another person, with intent to kill, wound or maim such person, etc." The verdict was guilty of "maliciously cutting with *intent to wound.*" The court pointed out that the same statute made "cutting with intent to kill" and "cutting with intent to wound" *two separate offenses.* The court further pointed out that "he (defendant) could not, upon this indictment, be properly found guilty of 'maliciously cutting with intent to wound. That is not an 'in-

ferior degree' to that charged in the indictment,' within the meaning of that statute, *but is of the same degree.*"

One of the tests laid down by the courts is that where several crimes are included, one within the other, a conviction or acquittal of the higher bars a prosecution for any lower, since the greater includes the less. In the case now before us, *if* the defendant had been indicted and acquitted of *possession for sale*, he certainly could have been reindicted and convicted of *possession*. Both crimes are of equal degree, and one is not an included offense within the other. In one offense the wrongful act is the mere *possession*; in the other offense the wrongful act is the *possession for sale*.

It will be noted that Ohio Revised Code 3719.20 sets forth some eleven different prohibitions concerning narcotic drugs. Each of these eleven is different and separate from the others but each is of the same degree as the others. *Possessing for sale* is set up as an entirely distinct offense; *sale* is a distinct and separate offense. Each is independent of the other; both may be present in the same act; and convictions may be had on both notwithstanding there was but one act.

Possession for sale of a *contraband* such as narcotics is a complete offense, separate from the sale of that contraband. Possession of counterfeit money, a machine gun, etc., is in and of itself a distinct and separate offense from the sale of that contraband.

15 *American Jurisprudence* 63, on the question of double jeopardy, says, "A single act may constitute two or more distinct and separate offenses, and a person charged therewith may be convicted and punished for both." (*Roarke v. United States* (C. C. A. 8th), 17 F. (2d) 570; 51 A. L. R. 870.) "Prosecution of a person for separate offenses based upon the same transaction does not

involve double jeopardy where there are distinct elements in one offense which are not included in the other. These rules have been applied many times in particular prosecutions. For instance, they have been applied in prosecutions for abortion, adultery, forgery, unlawful operation of an automobile, incest, prostitution, larceny, burglary, violations of the liquor laws, etc."

Again, at 15 *American Jurisprudence* 67, is the following statement:

> "A single act may be an offense against two statutes, and if one statute necessitates proof of a different circumstance or element from that which the other requires, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other * * *. Undoubtedly, it is within the power of the legislature to create two or more offenses which may be committed by a single act, each of which is punishable by itself. A conviction or acquittal in such case under either statute would be no bar to a conviction under the other, for the accused would not be twice in jeopardy for each offense."

CONCLUSION.

It is respectfully submitted that an examination of the record in this case strongly establishes the guilt of these defendants and that their rights were in no way prejudiced by any factor of which complaint is made. For these reasons it is urged that the jury's verdict of conviction should be upheld and the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorney for State of Ohio.